

CASE

NUMBER:

99-135

INDEX FOR CASE: 99-135

AS OF : 05/25/99

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, DBA LUCKY DOG

Interconnection Agreements

TO RE-EVALUATE BELLSOUTH'S UNE RATES

IN THE MATTER OF THE PETITION OF AT&T COMMUNICATIONS OF THE
SOUTH CENTRAL STATES, INC. TO RE-EVALUATE BELLSOUTH'S UNE
RATES

SEQ NBR	ENTRY DATE	REMARKS
0001	03/26/99	Application.
0003	03/26/99	Petition to Re-Evaluate BellSouth's UNE Rates.
0002	04/09/99	Acknowledgement letter.
0004	05/24/99	Final Order denying AT&T's petition.



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

CERTIFICATE OF SERVICE

RE: Case No. 99-135

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, DBA LUCKY DOG

I, Stephanie Bell, Secretary of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the following by U.S. Mail on May 24, 1999.

Parties of Record:

James P. Lamoureux
& David Eppsteiner
AT&T Communications, Inc.
Room 8068
1200 Peachtree Street, N.E.
Atlanta, GA. 30309

Eric L. Ison
& Holland N. McTyeire, V
Greenebaum Doll & McDonald PLLC
3300 National City Tower
Louisville, KY. 40202

Honorable Creighton E. Mershon
General Counsel - Kentucky
BellSouth Telecommunications, Inc.
301 West Chestnut Street
P. O. Box 32410
Louisville, KY. 40232

Stephanie Bell

Secretary of the Commission

SB/hv
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF AT&T COMMUNICATIONS)
OF THE SOUTH CENTRAL STATES, INC. TO) CASE NO. 99-135
RE-EVALUATE BELL SOUTH'S UNE RATES)

O R D E R

On March 26, 1999, AT&T Communications of the South Central States, Inc. ("AT&T") filed a petition requesting the Commission to re-evaluate the rates to be paid for the unbundled network elements ("UNEs") of BellSouth Telecommunications, Inc. ("BellSouth"). The rates to be paid were established in Case Nos. 96-431¹ and 96-482,² arbitration proceedings conducted pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252. Pursuant to its own arbitration case, AT&T executed an agreement with BellSouth incorporating the specified UNE rates. By mutual agreement, the terms of this contract are in effect until August 13, 2000. Nevertheless, AT&T argues, among other things, that the rates are based upon faulty cost studies and that they do not, therefore, comply with pricing rules issued by the Federal Communications Commission. BellSouth has filed no response to the petition.

¹ Case No. 96-431, Petition By MCI For Arbitration of Certain Terms and Conditions of a Proposed Agreement With BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order dated December 20, 1996.

² Case No. 96-482, The Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C., Order dated February 6, 1997.

AT&T's contentions are nothing new, although they are now buttressed by new legal citations. The ink on the Order specifying rates was hardly dry before AT&T began filing motions to reopen the pricing issues which had been heard and decided during the strict time frame specified in 47 U.S.C. § 252(b)(4). This Commission denied AT&T's motions to open an additional docket to begin, from ground zero, re-evaluation of costs upon which UNEs are to be provided by BellSouth. The Commission held that it would not review the prices during the term of the current contract and that to do so would violate the statute. Consequently, AT&T filed suit, contending, inter alia, that the prices set by the Commission violate the law. The United States Court of Appeals for the Eastern District of Kentucky rejected AT&T's argument. See AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., 20 F. Supp.2d 1097 (E.D. Ky. 1998).

AT&T may, pursuant to federal law, request that BellSouth negotiate new prices when time for renewal is near. Should such negotiations reach impasse, the Commission stands ready to provide arbitration. For the time being, AT&T's renewed petition should be denied.

The Commission having been sufficiently advised, IT IS HEREBY ORDERED that AT&T's petition be, and it hereby is, denied.

Done at Frankfort, Kentucky, this 24th day of May, 1999.

By the Commission

ATTEST:


Executive Director



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

April 9, 1999

James P. Lamoureux
& David Eppsteiner
AT&T Communications, Inc.
Room 806B
1200 Peachtree Street, N.E.
Atlanta, GA. 30309

Eric L. Ison
& Holland N. McTyeire, V
Greenebaum Doll & McDonald PLLC
3300 National City Tower
Louisville, KY. 40202

Honorable Creighton E. Mershon
General Counsel - Kentucky
BellSouth Telecommunications, Inc.
301 West Chestnut Street
P. O. Box 32410
Louisville, KY. 40232

RE: Case No. 99-135
AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.
(Interconnection Agreements) TO RE-EVALUATE BELL SOUTH'S UNE RATES

This letter is to acknowledge receipt of initial application in the above case. The application was date-stamped received March 26, 1999 and has been assigned Case No. 99-135. In all future correspondence or filings in connection with this case, please reference the above case number.

If you need further assistance, please contact my staff at 502/564-3940.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Bell".

Stephanie Bell
Secretary of the Commission

SB/jc

GREENEBAUM DOLL & McDONALD PLLC

3300 NATIONAL CITY TOWER
101 SOUTH FIFTH STREET
LOUISVILLE, KENTUCKY 40202-3197
502/589-4200
FAX 502/587-3695

HOLLAND N. MCTYEIRE, V
502/587-3672
FAX 502/540-2223
E-MAIL hnm@gdm.com

Via Hand Delivery

March 26, 1999

Ms. Helen C. Helton
Executive Director
Public Service Commission
730 Schenkel Lane
P.O. Box 615
Frankfort, Kentucky 40602

RECEIVED

MAR 26 1999

PUBLIC SERVICE
COMMISSION

Case 99-135

Re: Petition of AT&T Communications of the South Central States, Inc. to Re-Evaluate BellSouth's UNE Rates

Dear Ms. Helton:

Enclosed herewith please find for filing with the Commission in the above-styled matter an original and ten copies of the Petition Of AT&T Communications Of The South Central States, Inc. To Establish A Proceeding To Re-Evaluate BellSouth's UNE Rates.

If you, or your staff, have any questions regarding AT&T's Petition, please do not hesitate to contact me.

Sincerely,

Holland N. McTyeire

Holland N. McTyeire, V

HNM/jh
Enclosures
cc: James P. Lamoureux

LOU-207202-1

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:)

Petition of AT&T Communications of)
the South Central States, Inc. to)
Re-Evaluate BellSouth's UNE Rates)

Case No. 99-135

RECEIVED
MAR 26 1999
PUBLIC SERVICE
COMMISSION

**PETITION OF AT&T COMMUNICATIONS OF
THE SOUTH CENTRAL STATES, INC. TO ESTABLISH A
PROCEEDING TO RE-EVALUATE BELL SOUTH'S UNE RATES**

AT&T Communications of the South Central States, Inc. ("AT&T"), respectfully petitions this Commission to establish a proceeding re-evaluate the rates established for BellSouth's unbundled network elements in the Commission's December 20, 1996, Order in Case No. 96-431 (the MCI/BellSouth arbitration) and its February 6, 1997, Order in Case No. 96-482 (the AT&T/BellSouth arbitration). AT&T requests a procedural and scheduling order for additional hearings and evidence to ensure that the methodologies and rates adopted by this Commission comply with the Commission's May 22, 1998, Universal Service Order in Administrative Case No. 360, the federal Telecommunications Act of 1996 ("the Act"), the FCC's rules, and the recent Supreme Court decision of *AT&T v. Iowa Utilities Board*, __U.S.__, No. 97-826, 67 U.S.L.W. 4014, 1999 U.S. LEXIS 903, 1999 W.L. 24568 (Jan. 25, 1999) ("*AT&T v. Iowa Utilities*"). In support of its Petition, AT&T shows the following:

1. In its February 6, 1997, Order in Case No. 96-482, the Commission established the rates AT&T would have to pay for BellSouth's unbundled network elements ("UNEs"). Similarly, in Case No. 96-431, the Commission established the rates MCI would have to pay for BellSouth's UNEs. Those rates were based on UNE cost studies submitted by BellSouth as part of the arbitration conducted under the Act . On July 14, 1997, the Commission issued an Order in both Case Nos. 96-431 and 96-482 denying requests by AT&T, MCI and ACSI for a generic proceeding to address BellSouth's UNE cost studies and non-recurring charges.

2. Subsequent to the Commission's orders in Case Nos. 96-431 and 96-482, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee conducted "generic" proceedings to establish permanent rates for BellSouth's UNEs.¹ The UNE cost hearings conducted in those states focused solely on the issue of prices for BellSouth's UNEs and the cost studies supporting UNE prices. Some of those hearings lasted over a week, and produced a significant volume of information concerning BellSouth's cost studies. Substantial discovery was conducted, numerous witnesses testified, and the parties submitted thorough comments and briefs in those hearings. Much of the information gathered in those proceedings was not available to the Commission when it issued its orders in Case Nos. 96-431 and 96-482. Moreover, the parties were able to focus on the cost studies in greater depth and

¹ The Florida Public Service Commission recently recommended that the Florida commission commence a generic UNE price case.

detail in the generic UNE proceedings than in the arbitrations, including the Kentucky arbitration.

3. The BellSouth cost studies submitted in the generic UNE price proceedings in other states, although similar in underlying concept, evolved significantly from the cost study submitted by BellSouth in Case Nos. 96-431 and 96-482 and adopted by the Commission to establish UNE rates in Kentucky. In the UNE proceedings conducted in other states, BellSouth used a software model it developed to generate UNE prices, rather than the paper cost studies BellSouth produced in Case Nos. 96-431 and 96-482.

4. In its May 22, 1998, Universal Service Order in Administrative Case No. 360, the Commission selected the Hatfield Model as the appropriate forward looking cost model for calculating the cost of universal service in Kentucky. In its Order, the Commission noted, "Actions that the Commission is taking in this Order necessitate revisiting UNE cost estimates determined in prior cases upon the expiration of the interconnection agreements specifying UNE prices." *USF Order* at 34. Further, the Commission affirmed that it would "work diligently to minimize the creation of uneconomic barriers to local market entry, as well as to ensure that all eligible service providers receive the correct amount of universal service support." *Id.* Opening a proceeding to re-evaluate the rates established in Case Nos. 96-431 and 96-482 would fulfill the Commission's commitment in Administrative Case No. 360 to revisit BellSouth's UNE rates in light of the Commission's selection of the Hatfield Model as its USF cost model.

5. The Federal Communication Commission (“FCC”), in implementing the Telecommunications Act of 1996, issued a First Report and Order, (Order No. 96-325, CC Docket No. 96-98), which included Final Rules governing, among other matters, general pricing standards to assist state commissions with determining cost based rates. (47 C.F.R. §51.501 et. seq.)

6. In its Rules, the FCC required that all network element rates, interconnection, and collocation prices be just, reasonable, non-discriminatory and established by the state “pursuant to a forward looking economic cost-based pricing methodology.” 47 C.F.R. §51.503(b)(1). The forward-looking costs were to include the total element long-run incremental costs (“TELRIC”) and a reasonable allocation of forward-looking common costs. 47 C.F.R. §51.505(a). Any embedded costs incurred by an incumbent local exchange carrier were not to be included in the forward-looking economic costs. 47 C.F.R. §51.505(d)(1). The rules also required a state commission to establish geographically deaveraged rates based upon a minimum of three (3) geographic areas. 47 C.F.R. §51.507(f).

The FCC specifically noted that “[f]orward looking methodologies, such as TELRIC, are intended to consider the costs that a carrier *would incur in the future*, rather than the costs that the carrier has already incurred.” *First Report and Order* ¶ 683. Thus, the FCC distinguished such forward looking methodologies from “embedded” cost methodologies, in which “the cost of

interconnection and unbundled network elements would be based on existing network design and technology that are currently in operation.” *Id.*

The approach required under the FCC’s rules is often referred to as the “scorched node” method. It assumes that wire centers will be placed at the incumbent LEC’s current wire centers, but that the rest of the network will be reconstructed assuming the most efficient technology for reasonably foreseeable capacity requirements. *First Report and Order* ¶ 685. Thus, the FCC rules require that the “total element long-run incremental cost should be measured based on the use of the lowest cost network configuration, given the existing location of the incumbent LEC’s wire centers.” 47 C.F.R. § 51.505(b)(1).

Prices should be set at TELRIC, as the FCC has defined it, not only because the FCC’s rules require them to be but also to foster competition in Kentucky. Setting UNE prices at TELRIC, as the FCC requires, “best replicates, to the extent possible, the conditions of a competitive market.” *First Report and Order* ¶ 679. Thus, TELRIC “creates the right investment incentives for competitive facilities-based entry and creates incentives for the market to move towards competition while preserving opportunities for competition even if some network elements prove to be resistant to competition”. (*Id.* at ¶ 635.) If UNE prices are set higher than TELRIC, competition will be stifled; conversely, if UNE prices are set lower than TELRIC, such prices will not cover all the costs necessary to provide UNEs, and all competitors will suffer. In short, true TELRIC based prices--prices that comply with the FCC’s pricing rules--“best further[] the goals of the Act,” and offer the best hope of bringing competition to

Kentucky, and the benefits of competition to the Kentucky consumers. *First Report and Order* ¶ 620.

7. The 8th Circuit Court of Appeals vacated the FCC pricing rules. *Iowa Utilities Board, et. al. v. FCC*, 120 F.3d 753 (8th Cir. 1997). On January 25, 1999, however, the Supreme Court reversed the 8th Circuit. *AT&T v. Iowa Utilities Board*, ___ U.S. ___, No. 97-826, 67 U.S.L.W. 4104, 1999 U.S. LEXIS 903, 1999 W.L. 24568 (Jan. 25, 1999). Thus, all of the pricing standards adopted by the FCC are applicable to the rates established by this Commission in Case Nos. 96-431 and 96-482. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

8. On September 9, 1998, the United States District Court for the Eastern District of Kentucky (Frankfort Division) issued its decision in its review of AT&T's Kentucky interconnection agreement with BellSouth. The court found that the Commission was within its discretion in adopting BellSouth's cost studies to establish UNE prices. However, at the time of the court's decision, the FCC's UNE pricing rules and its rule prohibiting BellSouth from disassembling combined elements had been vacated by the Eighth Circuit. Thus, the court did not review the question of whether BellSouth's cost studies reflect TELRIC, as the FCC specifically defines TELRIC.

9. As the UNE cost proceedings conducted in other states have revealed, BellSouth's cost studies, and the UNE prices derived therefrom, violate the FCC's UNE pricing rules. BellSouth's cost studies assume the historic configuration and design of BellSouth's network--in particular, the configuration and design of BellSouth's loops in its network in Kentucky--as well

as costs which reflect historical purchase prices and operating procedures. In addition, BellSouth's cost studies do not allow for geographic deaveraging, as required under the FCC's rules.

10. The UNE cost proceedings in other states also have revealed that BellSouth's cost studies assume the use of older technology rather than forward looking technology, resulting in inflated UNE prices. Thus, BellSouth's cost studies assume that BellSouth will not provide CLECs with Integrated Digital Loop Carrier ("IDLC") technology, including advanced versions of IDLC which are compliant with the GR-303 protocol (Next Generation Digital Loop Carrier or "NGDLC. BellSouth's cost studies for local loops and local switch ports were based on the use of older universal digital loop carrier ("UDLC") technology at higher costs. BellSouth's treatment of IDLC and NGDLC in its cost studies is inappropriate under the FCC's pricing rules. The TELRIC of elements made available under the FCC's UNE definitions must reflect "the most efficient technology for reasonably foreseeable capacity requirements." *First Report and Order* ¶ 685; *see also* 47 C.F.R. § 51.505(b)(1)(must reflect "the most efficient telecommunications technology currently available.").

11. The Supreme Court's decision confirms the decision of this Commission that BellSouth may not separate already combined network element combinations. The Supreme Court reversed the Eighth Circuit and upheld the validity of FCC rule 315(b), which forbids incumbents from separating already-combined network elements before leasing them to CLECs. *AT&T Corp.*, WL 24568 at 18; *see also* 47 C.F.R. § 51.315(b). The Court reasoned that in the

absence of Rule 315(b) "incumbents could impose wasteful costs" on carriers who requested network elements, even if entrants did not seek access to the incumbents' entire preassembled networks, and that the FCC therefore had acted reasonably in preventing this "anticompetitive practice." (Id.)

The UNE cost proceedings in other states have revealed that BellSouth's UNE prices are premised on the assumption--built into BellSouth's cost studies--that BellSouth will not provide CLECs with a combination of a loop and a port as UNEs. Instead, BellSouth's UNE cost studies assumes that BellSouth will only provide CLECs with a loop and a port physically separated from each other. It is thus now clear that BellSouth's cost studies—and the resulting prices—violate the Commission's and the Supreme Court's decision on the issue of UNE combinations.

WHEREFORE, for the foregoing reasons, AT&T respectfully requests that the Commission re-evaluate the rates established by its Orders in Case Nos. 96-431 and 96-482 and issue a procedural and scheduling order for the submission and review of TELRIC cost studies and to establish UNE rates for BellSouth consistent with: (1) the Commission's decision in Administrative Case No. 360, (2) the Commission's decision on the UNE combinations issue, (3) the Supreme Court decision, and (4) the FCC's UNE pricing rules.

Respectfully submitted,



Eric L. Ison
Holland N. McTyeire, V

GREENEBAUM DOLL & MCDONALD PLLC
3300 National City Tower
Louisville, KY 40202
(502) 589-4200

-and-

James P. Lamoureux
David Eppsteiner

AT&T COMMUNICATIONS, INC.
Room 8068
1200 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 810-4196

COUNSEL TO AT&T COMMUNICATIONS OF
THE SOUTH CENTRAL STATES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition Of AT&T Communications Of The South Central States, Inc. To Establish A Proceeding To Re-Evaluate BellSouth's UNE Rates was mailed, postage prepaid, to Creighton E. Mershon, Sr., counsel for BellSouth Telecommunications, Inc., 601 West Chestnut Street, P.O. Box 32410, Louisville, Kentucky 40232 this 26th day of March, 1999.



COUNSEL TO AT&T COMMUNICATIONS OF
THE SOUTH CENTRAL STATES, INC.